

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

WILLIAM R. McCAIN,)	
)	C.A. No. 08A-09-002 (JTV)
Appellant,)	
)	
v.)	
)	
THE COUNCIL ON REAL)	
ESTATE APPRAISERS,)	
)	
Appellee.)	

Submitted: January 13, 2009

Decided: May 29, 2009

David N. Rutt, Esq., Moore & Rutt, P.A., Georgetown, Delaware. Attorney for Appellant.

Barbara J. Gadbois, Esq., Department of Justice, Wilmington, Delaware. Attorney for Appellee.

*Upon Consideration of Appellant's Appeal
From Decision of the Council on Real Estate Appraisers*
AFFIRMED

VAUGHN, President Judge

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OPINION

William R. McCain, a Delaware licensed and certified real estate appraiser, appeals a decision of the Council on Real Estate Appraisers finding that he violated Council Rule 4.1.7¹ and 24 *Del. C.* § 2938(7).² As punishment, the Council gave the

¹ Rule 4.1.7 states as follows:

Each written appraisal report prepared by or under the direction of a State licensed or State certified real property appraiser shall bear the signature of the State licensed or State certified appraiser, the license or certificate number of the licensee or certificate holder in whose name the appraisal report is issued, and the appropriate title such as “appraiser trainee” (as co-signer only), “State licensed real property appraiser,” “State certified residential real property appraiser,” or the designation “State certified general real property appraiser,” or the approved abbreviations as specified in Rule 4.1.1. Said certified or licensed appraiser shall be fully responsible for the content of the report prepared under his or her direction. Where applicable, each appraisal report shall also indicate whether or not the State licensed or State certified appraiser has personally inspected the property, and shall identify any other person who assists in the appraisal process other than by providing clerical assistance.

² The statute as it existed at the time the appraisal report was prepared provides:

The rights of any person as a state certified or licensed real estate appraiser may be revoked or suspended, or the person may be otherwise disciplined in accordance with the provisions of this subchapter, upon any of the grounds set forth in this section. The Council may investigate the actions of a state certified or licensed real estate appraiser, and may revoke or suspend the rights of a certified or licensed real estate appraiser, or otherwise discipline an appraiser for any of the following acts or omissions:

....

(7) Negligence or incompetence in developing an appraisal, in preparing an appraisal report, or in communicating an appraisal.

24 *Del. C.* § 2938(7).

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appellant a letter of reprimand. The violation was based upon the appellant's alleged failure to give adequate supervision over an appraiser trainee in connection with an appraisal report prepared in November 2004, and his failure to include his Delaware license number on the same.

FACTS

The appellant is a Certified General Real Property appraiser with twenty-five years of experience. He has owned his own business, W.R. McCain and Associates, for twenty years, and holds appraiser licenses in Delaware, Maryland, and Virginia.

On November 26, 2007, the State of Delaware filed a complaint with the Council on Real Estate Appraisers arising from a land appraisal report prepared by the appellant's firm during the above-mentioned month and year. The report was actually prepared by Gretchen Nichols, a licensed appraiser trainee, respecting land in Selbyville, Delaware. According to the undisputed facts, Ms. Nichols signed the second page of the report on the signature line designated "Appraiser(s)," and the appellant signed the report on the line designated "Review Appraiser (if applicable)." The title under the appellant's signature read "William R. McCain, MAI, MBA." The appellant checked the appropriate box indicating that he did not physically inspect the property. The last page of the appraisal report was also signed by Ms. Nichols and the appellant. Ms. Nichols signed under "Appraiser," without noting her trainee status, and her state certification number was omitted. The appellant signed under the

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designation “Supervisory Appraiser (only if required),” and again his signature read “William R. McCain, MAI, MBA.” The appellant’s Maryland license number was entered with his signature, rather than his Delaware license number.

Mr. McCain testified that the omission of his Delaware number, and the designation of Ms. Nichols as “Appraiser,” were caused by a glitch in the appellant’s land form software. According to the appellant, the software automatically defaulted to his Maryland identification information. The appellant claims that he was not aware of the computer issue until he noticed the errors on the appraisal report.

The events that gave rise to this action began with an investigation by the lender for whom the appraisal report was prepared. The appellant himself brought the license number mix-up to the attention of the investigator assigned to review the appraisal report’s substantive content.³ After discovering the errors in the report, the appellant reviewed similar appraisal reports prepared by his firm during the months preceding and following November 2004, and he found that none of those reports reflected similar issues. The State of Delaware thereafter filed a complaint against the appellant which led to the hearing before the Board and its conclusions that the appellant had violated Council Rule 4.1.7 and 24 *Del. C.* § 2938(7).

STANDARD OF REVIEW

A decision of the Council on Real Estate Appraisers is reviewable to this Court

³ The investigator did not find any substantive errors in the appraisal report, and the State has never alleged any problems with the content of the report.

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upon appeal by the practitioner.⁴ The Court employs the basic standard of review for administrative agency decisions, that is, whether the agency's ruling is supported by substantial evidence and is free from legal error.⁵ Substantial evidence is "evidence which affords a substantial basis of fact from which the fact in issue can be reasonably inferred."⁶ "The Court does not re-weigh the evidence, nor does the Court substitute its judgment for the factual determinations made by the Board or Council below."⁷

DISCUSSION

The most pertinent part of the Council's decision appears to be the following:

After consideration of the evidence presented, and the charged violations, the Council concluded that Mr. McCain was negligent and incompetent in his preparation of the November 2004 appraisal report. The report was misleading in that the cover page stated that the appraisal was performed by Ms. Nichols, with no indication that she was a trainee. Further, there was no indication on the signature pages that Ms. Nichols was a trainee. The report did not communicate to the reader that Ms. Nichols was only a trainee and that Mr. McCain was ultimately

⁴ 24 Del. C. § 4017(c); *Phillips v. Div. of Prof'l Regulation*, 2004 WL 440414, at *2 (Del. Super. Feb. 20, 2004).

⁵ *Phillips*, 2004 WL 440414, at *2; *Berchock v. Council on Real Estate Appraisers*, 2001 WL 541026, at *3 (Del. Super. Apr. 26, 2001).

⁶ *Phillips*, 2004 WL 440414, at *2 (quoting *Down Under, Ltd. v. Del. Alcoholic Beverage Control Comm'n*, 576 A.2d 675, 681 (Del. Super. 1989)).

⁷ *Hoopes v. Del. Council of Real Estate Appraisers*, 2006 WL 3308203, at *1 (Del. Super. Oct. 19, 2006).

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responsible for the report.

Mr. McCain's explanation that the inclusion of his Maryland license number was due to the operation of computer software did not relieve him of his responsibility for reviewing the report and ensuring its accuracy. If he had exercised that responsibility, he would have detected and corrected the errors.

The Council thus finds that Mr. McCain's conduct violated both Council Rule 4.1.7 and 24 *Del. C.* § 2938(7). Given that Mr. McCain's conduct represented an isolated incident, the Council concludes that a letter of reprimand is the appropriate discipline.

The appellant contends that the Council erred in finding that he was negligent in the preparation of the appraisal report; that he was incompetent in the preparation of the appraisal report; and that the appraisal report was misleading. He further contends that the Council committed error as a matter of law when it issued a letter of reprimand as its disciplinary action.

With regard to negligence, the appellant further contends that because Rule 4.1.7 is silent as to the Council's authority to impose sanctions for a violation of the rule, and 24 *Del. C.* § 2938(7) does not refer to any particular rule or regulation, the Council erroneously found that a violation of Rule 4.1.7 automatically constitutes a violation of the statute. The appellant contends that this is a case of negligence *per se*, given that negligence forms the basis for a violation under 24 *Del. C.* § 2938(7) and "negligence" is not defined in the statute. Under the case law formulation of negligence *per se*, the appellant contends, the Council lacked substantial evidence to

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find (1) that the State was within the class of persons the statute was designed to protect, (2) that the appellant was negligent in preparing the appraisal report, or (3) that anyone was injured or damaged by the minor errors in the report. The appellant emphasizes that the appraisal report was deemed accurate by the independent investigation, and the State has acknowledged this fact. The appellant also notes that the errors were merely typographical, and that he was the one who reported the errors. The appellant contends that his actions in self-reporting the problem and exercising due diligence thereafter with respect to other appraisal reports prepared by his firm were those of an honest and ethical professional.

Contrary to the appellant's argument, this is not a case of negligence *per se*. Delaware case law suggests that, where a statute does not identify a particular standard of conduct, and an individual violates the statute, the violation does *not* constitute negligence *per se*.⁸ By definition, negligence *per se* requires a deviation from a specific, statutorily prescribed standard of care:

The doctrine of negligence *per se* is well-established in Delaware. The violation of a regulation, with the force of law, which is enacted for the safety of others constitutes negligence *per se*. The elements which must be present before the Court applies the doctrine are: a standard of conduct exists to protect the class of which plaintiff is a member; defendant is required to conform to that standard

⁸ *Tydings v. Loewenstein*, 505 A.2d 443 (Del. 1986) (land surveyor's alleged violation of licensing statutes by preparing plans for construction project without holding engineering license did not constitute negligence *per se*); *Hall v. Bioquest Laboratories, Inc.*, 1991 WL 138362 (Del. Super. June 17, 1991) (mere fact that defendant lab was not licensed was not negligence *per se*, where no licensing statutes or regulations defined a standard of conduct).

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of conduct; and the defendant did not so conform.⁹

The appellant further contends that in order to find him negligent, the Council must establish the elements of negligence; specifically, a duty owed to the State as a member of a class of persons intended to be protected against the alleged negligent act or omission, breach of that duty, injury, and causation.¹⁰ Since these elements have not been established, he contends, the Council's decision is not supported by substantial evidence.

I do not read 24 *Del. C.* § 2938(7), a regulatory statute, however, as requiring the establishment of all the elements of a cause of action in negligence, as appellant seems to assert. The statute gives the Council the authority to impose discipline in its discretion if it finds that an appraiser has been negligent in developing, preparing or communicating an appraisal. Negligence is simply defined as a lack of ordinary care; that is, the absence of the kind of care a reasonably prudent and careful person (in this case a certified real estate appraiser) would exercise in similar circumstances.¹¹ The statute does not require wilfulness, ill will or any intent to commit a wrong. An error can constitute negligence even if isolated and innocent, in the sense of being unintended.

⁹ *Hall*, 1991 WL 138362, at *2.

¹⁰ *See Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2007 WL 1207106, at *6 (Del. Ch. Feb. 8, 2007); *Hall v. Dorsey*, 1998 WL 960774, at *2 (Del. Super. Nov. 5, 1998).

¹¹ *Chilson v. Allstate Ins. Co.*, 2008 WL 5206777, at *3 (Del. Super. Dec. 3, 2008) (citing Del. Super. P.J.I. Civ. § 5.1 (2000)).

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In this case the appellant was clearly in literal violation of Rule 4.1.7. As to negligence, I am persuaded that the Council's reasoning and finding of negligence as set forth in the quoted portion of its decision above is supported by substantial evidence. The report had several errors, including the omission of Ms. Nichols' trainee status, the omission of her state certification number, and the error in stating Mr. McCain's certification number. The Council's conclusion that these errors rendered the report misleading, although generating some apparent disagreement within the Council, is not a conclusion which I find to be unreasonable, unsupported by substantial evidence, or containing legal error. From the record, it appears that the Council's conclusion that the appellant acted negligently is based, at least in part, upon his failure to discover and correct the errors while reviewing it to ensure its accuracy. This conclusion I also find to be reasonable, supported by substantial evidence, and free of legal error.

The statute permits discipline where the Council finds "negligence or incompetence."¹² Either suffices. Since I find that the record supports the Council's finding of negligence, I need not separately address the Council's additional finding that the appellant acted incompetently.

The appellant's contention that the Council erred in issuing a reprimand must also be rejected. Title 24, section 2938 gives the Council authority to revoke or suspend a licensee's license or to otherwise impose discipline for any violation of 24 *Del. C.* § 2938. Sections 2912 and 2939 serve other purposes and are irrelevant to

¹² 24 *Del. C.* § 2938(7).

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this case.

Therefore, the Council's decision is *affirmed*.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File